PP

v.

ZULKIPLI OTHMAN & ORS

HIGH COURT MALAYA, KUANTAN
APANDI ALI J
[CRIMINAL TRIAL NOS: 45-3-02 & 45-5-02]
10 JANUARY 2005

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 6 and 39B(1)(a) - Possession of cannabis and trafficking in cannabis - Whether prima facie case made out - Whether there was direct evidence of trafficking - Whether accused failed to rebut presumption of trafficking - Dangerous Drugs Act 1952, s. 37(da)*

EVIDENCE: *Information leading to fact discovered - Admissibility of statement - Issue of voluntariness - Discretion of court - Whether fair and appropriate to have a trial within a trial - Evidence Act 1950, s. 27*

The accused was originally charged jointly with two other persons for possession of 13.7 grams of cannabis, an offence under s. 6 of the Dangerous Drugs Act 1952 ('the DDA'), and was also charged with one of the other co-accused for trafficking in 237.4 grams of cannabis, an offence under s. 39B(1)(a) of the DDA. The police arrested the accused and two others in a raid; they found three small packages containing dried leaves suspected to be cannabis in the premises. The three persons were then handcuffed and questioned as to the whereabouts of any more cannabis, and the accused was the only one who responded to the question, giving information leading to the discovery of cannabis at the premises adjacent to the premises they were occupying. The information leading to the discovery was an answer given by the accused in response to a pertinent question posed by the police and was recorded in the notes of evidence. The accused objected to the admission of the said recorded answer as it involved the issue of voluntariness, and contended that a trial within a trial ought to be held for purposes of evidence to be admitted under s. 27 of the Evidence Act 1950 ('the EA').

Held:

[1] In order to exercise this court's discretion to maintain or exclude the evidence of information leading to discovery under s. 27 of the EA, which had already been recorded at this trial, it was proper, fair and appropriate to have a trial within a trial. In making the ruling, the fact that all the accused persons were questioned and interrogated after the arrest had been made and while they were in handcuffs was also taken into consideration. Having concluded that since evidence leading to discovery fell under the provision of s. 27 of the EA and having recorded such evidence, the court had to exercise its discretion to maintain or to reject such evidence, and see to it that the legitimate interest of both parties were adequately provided for. (p 341 b-e)

[1a] Before deciding at the close of the prosecution's case, it was ruled that the evidence of information leading to discovery as admitted under s. 27 of the EA could be retained, and formed part of the prosecution's case. (p 341 h)

[2] At the end of the prosecution's case, it was concluded that: (i) there was not an iota of evidence to prove common intention under s. 34 of the Penal Code, which had been incorporated into the charge; (ii) there was no evidence to connect the 2nd and 3rd accused with the cannabis found, either at the premises occupied or at the unoccupied premises; and (iii) there was sufficient *prima facie* evidence against the 1st accused. (p 342 a-b)

[3] Having found the 1st accused to be in possession of the 50 small packages of cannabis in a bag coupled with the manner of the recovery of the said bag, it was found that there was direct evidence of trafficking. After perusing the notes of evidence at the end of the trial and in particular after testing the accused's story as against the case for the prosecution and in compliance with the provision of s. 173(m)(i) of the Criminal Procedure Code, the prosecution had proved its case beyond reasonable doubt. On the facts, the accused's story was just a bare denial and failed, on a balance of probabilities, to rebut the presumption of trafficking under s. 37(da) of the DDA. (pp 343 d, 346 c & 347 g)

[Accused found guilty of both charges. 2nd and 3rd accused acquitted and discharged.]

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chan Pean Leong v. PP [1956] 22 MLJ 237 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(foll)***
Ganapathy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Hasamuddin Talena v. PP [2002] 2 AMR 1995 ***(refd)***
Kesavan Petchayo v. PP [2003] 1 CLJ 846 CA ***(refd)***
Kiew Foo Mui & Ors v. PP [1996] 1 CLJ 14 SC ***(dist)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(foll)***
Md Desa v. PP [1995] 4 CLJ 677 FC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 ***(refd)***
PP v. Er Ah Kiat [1966] 1 MLJ 10 ***(refd)***
PP v. Gurdial Singh [2003] 1 CLJ 37 HC ***(refd)***
PP v. Johar Mustafa [2004] 5 CLJ 187 HC ***(refd)***
PP v. Karim Othman [1993] MLJU Lexis 646 ***(refd)***
PP v. Letchumanan [2000] 4 CLJ 685 HC ***(refd)***
PP v. Mohd Farid Mohd Sukis [2002] 3 MLJ 401 ***(refd)***
PP v. Mohamad Musa Amarullah [2002] 1 CLJ 366 HC ***(refd)***
PP v. Mohamed Musa [2002] 1 MLJ 261 ***(refd)***
PP v. Reza Mohd Shah Ahmad Shah [2002] 4 MLJ 13 ***(refd)***
PP v. Toh Ah Keat [1977] 2 MLJ 87 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 158(1), 173(f), (m)(i)
Dangerous Drugs Act 1952, ss. 2, 6, 37(i), (da), (vi), 39B(1)(a)
Evidence Act 1950, ss. 24, 27
Penal Code, s. 34

For the prosecution - Ahmad Rosli Mohd Sham DPP
For the accused - Syed Azimal Amir Syed Abu Bakar (Rizal Chek Hashim)

Reported by Suresh Nathan

JUDGMENT

Apandi Ali J:
The accused was originally charged jointly with two others for possession of 13.7 grammes of cannabis, an offence under s. 6 of the Dangerous Drugs Act 1952; and was also charged with one of the other co-accused for trafficking 237.4 grammes of cannabis, an offence under s. 39B(1)(a) of the same Act.

The charges were as follows:

(1) 1st charge:

Bahawa Kamu, Zulkipli bin Othman Kp: 740514-11-5459, Khairul Anuar bin Bakar Kp: 720628-06-5447 Dan Mohd Foat bin Bakar Kp: 8202-06-5111, Pada 16hb. Mei 2001. Jam Lebih Kurang 12.30 Tengah Malam, Di Sebuah Rumah Beralamat No. P 459 U Kuarters Politeknik Sultan Hj. Ahmad Shah, Semambu, Dalam Daerah Kuantan, Di Dalam Negeri Pahang Darul Makmur, Di Dalam Melaksanakan Niat Umum Bersama, Didapati Mengawal Dadah Berbahaya Cannabis Berat 13.9 Gram Dan Dengan Itu Kamu Telah Melakukan Suatu Kesalahan Di Bawah Seksyen 6 Akta Dadah Berbahaya 1952 (Pindaan 1998) Dan Boleh Dihukum Di Bawah Seksyen Yang Sama Dengan Dibaca Bersama Seksyen 34 Kanun Keseksaan.

(2) 2nd charge:

Bahawa Kamu, Zulkipli Bin Othman Kp: 740514-11-5499 Dan Khairul Anuar Bin Bakar Kp: 720628-06-5447, Pada 16hb. Mei 2001, Jam Lebih Kurang 12.30 Tengah Malam, Di Sebuah Rumah Beralamat No. P 459 V Kuarters Politeknik Sultan Hj. Ahmad Shah Semambu, Dalam Daerah Kuatan, Di Dalam Negeri Pahang Darul Makmur, Di Dalam Melaksanakan Niat Umum Bersama, Di Dapati Mengedar Dadah Berbahaya Cannabis 237.4 Gram Dan Dengan Itu Kamu Telah Melakukan Suatu Kesalahan Di Bawah Seksyen 39b(1) (A) Akta Dadah Berbahaya 1952 Dan Boleh Dihukum Dibawah Seksyen 39b(2) Akta Yang Sama Dengan Dibaca Bersama-sama Seksyen 34 Kanun Keseksaan.

Both the charges were jointly tried. At the end of the case for the prosecution, the two other co-accused were acquitted and discharged on both charges and the accused was called upon to enter his defence. The prosecution did not file any Notice of Appeal in respect of the acquittals of the two co-accused. At end of the trial, the accused was found guilty for both offences. The accused is now appealing against the conviction and sentence in respect of the offence under s. 39B of the Dangerous Drugs Act 1952 only. There is no appeal against the conviction and sentence under s. 6 of the Dangerous Drugs Act 1952.

Brief Facts Of Arrest

Briefly stated, the facts of the case are that on 16 May 2001, Chief Inspector Azhar bin Ahmad (SP1) led a party of police personnels consisting of D/Sgt. Haridan Abd. Hamid, D/Cpl. Ahmad; D/L/Cpl. Shaimee and D/L/Cpl. Rosmawi and raided a premise known as P459U Quarters Polytechnic, Semambu, Kuantan, Pahang. It was an apartment-like premises

situated on the 3rd Floor of a block of housing quarters for the polytechnic's staff. It was about 12.30 in the morning. Upon peeping through the window, SP1 saw three persons watching TV.

SP1 knocked on the door and identified himself as police. The accused was seen running towards the back. The police kicked the door, entered and arrested all the three occupiers. The accused was arrested at the back verandah of the apartment and the other two at the hall. The police searched the arrested persons, found nothing but upon searching the premises found three small packages containing dried leaves suspected to be cannabis, in the hall. The three persons were then hand-cuffed and SP1 conducted an impromtu questioning of the arrestees as to the where-about of anymore cannabis. Out of the three arrestees, only the accused responded to the question and gave information leading to the discovery of cannabis at the premises (No. P459V) adjacent to the premises they were occupying.

Information Leading To Discovery

In consequence of the information given, the accused took a key to the adjacent premises and led the police party into a room at the said premises and took a bag and handed it to SP1. In the bag there are 5 plastic packages, each containing 10 smaller plastic packages; altogether 50 small plastic packages, containing dried leaves suspected to be cannabis.

In the course of the evidence of SP1, the information leading to discovery was in respouse to the pertinent question posed by SP1 and the answer given by the accused are as recorded in the notes of evidence as follows: "Soalan yang di tanya: "mana lagi ganja?" Jawapan yang diberi oleh Zulkipli: "Saya ada simpan sedikit lagi ganja dirumah sebelah yang tiada penghuni."

Learned counsel for the accused objected to the admission of the said recorded answer as it involves the issue of voluntariness, and quoted the case of *PP v. Gurdial Singh* [2003] 1 CLJ 37 to support his contention to have a *voir dire*. Counsel also suggested that the procedure adapted in *PP v. Mohd Farid b. Mohd Sukis* [2002] 3 MLJ 401 should be adopted and that a trial within a trial be held. The learned deputy public prosecutor argued that a *voir dire* is not necessary and cited *PP v. Mohamad Musa Amarullah* [2002] 1 CLJ 366. The learned defence counsel countered that despite the different provisions of s. 27 and s. 24 of the Evidence Act, only when a statement is a confession then there must be a trial within a trial, citing *Md. Desa v. PP* [1995] 4 CLJ 677 as authority.

The issue raised by counsel is whether a trial within trial ought to be held for purposes of evidence to be admitted under s. 27 of the Evidence Act. After hearing out the arguement of both sides, the court made the following ruling (as recorded in the notes of evidence):

Court's ruling:

After hearing submissions from both sides, and after reading the relevant case law, I find that:

– The Federal Court case of *Md. Desa* ruled that Section 27 Evidence Act was subject to Section 24 Evidence Act and therefore it must be voluntary. To determine voluntariness the Court held that a trial within a trial must be held.

– The Federal Court in the case of *Goi Ching Ang* overruled *Md. Desa* to the extent that Section 27 Evidence Act is independent of Section 24. The Federal Court also added that Section 27 is an exception to Section 24. Nevertheless the the Court held that Court has the discretion to admit or reject the evidence of information under Section 27 and based on such discretion on the fairness, whereby the legitimate interests of both the prosecution and the defence are adequately provided (see [1999] 1 CLJ at page 855).

– The interesting part is that the Federal Court in *Goi Ching Ang* agreed with *Md. Desa* that as a matter of policy, of the desirability as to the voluntariness of Section 27 information (see page 851)

After reading the two binding Federal Court decisions above and after having the guidance and persuasions in subsequent case law such as *PP v. Mohamed Musa* [2002] 1 MLJ 261; *PP v. Gurdial Singh* [2003] 1 CLJ 37, *PP v. Mohd Farid* [2002] 3 MLJ 401; *Kesavan Petchayo v. PP* [2003] 1 CLJ 846; and *Hasamuddin b. Talena v. PP* [2002] 2 AMR 1995, I find that:

In the case of *Goi Ching Ang*, while it categorically held that evidence of information under s. 27 is admissible because it is independent of s. 24, the case was silent as to how to go about in exercising the discretion to admit or reject the evidence. This probably gave rise to the seemingly conflicting decisions in *PP v. Gurdial* (where the learned judge held that *Md. Desa* is still the binding authority on the need to have a *voir dire*) and in *PP v. Mohamed Musa* (where the learned judge applied strictly the decision of *Goi Ching Ang* and held that a *voir dire* is not required).

In *PP v. Mohd. Farid*, the learned judge while following *Goi Ching Ang* in admitting the evidence of information under s. 27 without holding a trial within a trial, held that in view of the need to exercise discretion to exclude such evidence decided that a trial within a trial needed to be held. This was done after the evidence under s. 27 was admitted, and the onus during the trial within the trial is upon the accused person to show, on the balance of probabilities, that the evidence should be excluded.

Since the matter falls under the category of exercising my discretion, and in the name of fairness, and in view of the learned deputy public prosecutor agreeing that a trial within trial will not prejudice the prosecution, I hereby rule that in order to exercise my discretion to maintain or exclude the evidence of information leading to discovery under s. 27 Evidence Act, which has already been recorded at this trial, it is proper, fair and appropriate to have a trial within a trial. In making this ruling I also took into consideration of the fact that all the accused persons were questioned and interrogated after the arrest was made and while in hand-cuffs.

Burden of proof in a trial within a trial "adalah terletak pada OKT – kerana adalah dakwaan mereka keterangan yang telah diterima (dibawah s. 27) perlu diketepikan. Oleh itu pihak defens perlu beri keterangan dahulu."

Having concluded that since evidence leading to discovery falls under the provision of s. 27 of the Evidence Act and having recorded such evidence, following the case of *Goi Ching Ang v. PP* [1999] 1 CLJ 829, the court has to exercise a discretion to admit (in this case, to maintain) or to reject such evidence and see to it that the legitimate interest, of both parties are adequately provided.

To exercise such discretion, a trial within a trial was held. As the evidence under s. 27 of the Evidence Act has already been admitted, in the trial within a trial, the burden of proof was shifted to the accused to prove that such evidence ought to be rejected. After hearing submissions from both parties, the court reserved the decision of the trial within trial until the end of the prosecution's case and proceeded to hear the evidence of other witnesses in the main trial.

Decision At The End Of Prosecution's Case

After calling eight witnesses, including members of the raiding party, investigations officer, and the chemist, the prosecution closed its case. Before making the decision at the close of the prosecution's case, the court ruled that the evidence of information leading to discovery as admitted under s. 27 of the Evidence Act 1950 can be retained and forms part of the prosecution's case.

At the end of the case for prosecution, the court made the following conclusion:

(a) There is not an *iota* of evidence to prove common intention, under s. 34 of the Penal Code, which was incorporated in the charge.

(b) that there was no evidence to connect the 2nd accused and the 3rd accused with the cannabis found, either at the premises occupied or at the unoccupied premises;

(c) that there is sufficient *prima facie* evidence against the 1st accused.

Wherefore at the end of the case for prosecution, the 1st accused (the appellant) was called upon to enter his defence on both charges and both the 2nd and 3rd accused persons were acquitted and discharged without calling for their defence.

The finding of a *prima facie* case against the 1st accused is based, briefly, on the following facts:

(1) The information given to the police by 1st accused led to the discovery of the cannabis at the adjacent premises;

(2) The cannabis found in a bag is connected with the 3 small plastic packages containing cannabis found earlier at the premises occupied by the 1st accused and the two other accused as the answer given to the question posed "mana lagi ganja", was made after the discovery of the first three plastic packages. The subsequent discovery of a much larger amount of cannabis is correlated to the earlier smaller discovery, as the answer given was an immediate respond to a question uttered contemporaneously with the said earlier discovery of cannabis. There is a nexus between the three packages and the fifty packages recovered later.

(3) The 1st accused person had not only given information leading to the discovery of the cannabis, but had led police to the adjacent premise and retrieved the bag containing the 50 packages of cannabis.

(4) The nexus between the 3 small packages and the 50 small packages, besides the contemporaneous timing of information leading to discovery, is further bonded by the fact that all the small plastic packages are similar in shape and size. As such by giving such information and later retrieving the bag containing 50 such packages clearly denotes the "animus possidendi" of the 1st accused with all the cannabis, namely in the packages discovered and the packages retrieved.

(5) The retrieval of the bag containing the 50 packages of cannabis is direct evidence of control, knowledge and possession of the drugs by the 1st accused. The proof of the elements of control, knowledge and possession can be analogously compared to cases of similar modes of discovery and retrieval in cases involving firearms, in the cases of:

PP v. Er Ah Kiat [1966] 1 MLJ 10

PP v. Toh Ah Keat [1977] 2 MLJ 87

Chan Pean Leong v. PP [1956] 22 MLJ 237

(6) The defence did not seriously challenge the evidence of the chemist (SP8) as to the nature of drugs and the weight therein.

(7) From submissions made by learned counsel, there seems to be no submissions on other issues such as identification or broken-chain of evidence.

Having found the 1st accused to be in possession of the 50 small packages in the bag coupled with the manner of the recovery of the said bag, I find that there is direct evidence of trafficking. Section 2 of the Dangerous Drugs Act 1952, defines "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug; "There are 18 acts that can be construed to be trafficking, and as the definition reads "the doing of any of the following acts", any single act will suffice to say that one is trafficking in drugs. From the facts adduced, the are three acts that are attributable to the 1st accused namely "keeping"; "concealing" and "storing". *A fortiori*, why would one keep, conceal and store some 50 similar small packages of cannabis if it is not for purposes of distribution and trafficking.

However even without such direction evidence as stated about, the fact that the 1st accused was found to be in possession of more than 200 grammes of cannabis, by law the rebuttable resumption of trafficking under s. 37(da)(vi) of the Dangerous Drug Act 1952 is triggered and can be invoked against the 1st accused.

The finding of a *prima facie* case against the 1st accused is after giving due evaluation of the evidence adduced by the prosecution as required under the provisions of s. 173(f) of the Criminal Procedure Code and also as guided by the Court of Appeal decision in the case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

In view of the absence of the element of common intention under s. 34 of the Penal Code, which earlier forms part of the charges against the 1st accused, the charges were then according amended under the provisions of s. 158(1) Criminal Procedure Code. The accused was then called upon to enter his defence on the amended charges.

The Defence Story

The accused testified that he has been staying at the quarters of the Polytechnic occupied by the 2nd accused, Khairul Anuar for the past two years prior to his arrest on 16 May 2001. He was given the key to the said premises. He was a fishmonger, with a daily routine of going out at about 7.30am and coming back at about 6pm. The accused knew that the neighbouring quarters were vacant and also knew that Khairul Anuar has the key to one of the vacant quarters and that key is at the wall near the table in the premises that both of them occupy. The accused denied ever using the vacant premises.

On 15 January 2001, the accused went out to work as usual but came back earlier at 3.30pm, because Khairul Anuar asked him to go back early as two of his friends by the names of Mohd. Noor and Kechik were coming to their premises. Upon arrival at the premises, both Mohd. Noor and Kechik were already there, in the hall of the premises. After a while, Mohd Noor asked for the key to the next-door premises. Mohd Noor then took the key and went to the next-door premises, carrying with him a small brown bag ("bag office"). Mohd. Noor then came back with the key and told the accused that he had kept the bag in the nextdoor premises and asked the accused to keep on eye on the bag. Khairul Anuar came back at about 4.30pm and the accused left the premises at 4.50pm and came back later at about 11.45pm, on the same day.

Upon his return to the premises at 11.45pm, he found that Khairul Anuar was watching TV with his brother, Mohd Foat (the 3rd accused) who just came to the premises. At 12 mid-night, some one knocked on the door and the accused asked Mohd Foat to open the door. Before the door could be opened, the door was kicked open, and two men rushed in. The accused felt frightened and ran towards the back. He heard the words "polis" and "jangan lari" before the door was kicked open. The accused admitted that after being questioned about ganja he admitted saying "ada dirumah sebelah, tetapi tidak tahu kat mana". According to the accused, the police party themselves took them (the accused and Khairul Anuar) together with the key, to the next-door premises and with the aid of lighters, the police party themselves recovered the bag (P9). He denied ever showing where

the bag was hidden to the police. The accused denied having anything to do either with the 3 plastic packages found earlier in their premises or the bag containing the drugs. Accused further said that the bag (P9) was the one earlier brought by Mohd. Noor and Kechik.

During cross-examination by the learned deputy public prosecutor, the accused said that Mohd Noor and Kechik are frequent visitors. He said that he did not tell Khairul Anuar about the bag. He also did not tell the raiding officer, Insp. Azhar about them because he was not asked. During re-examination, the accused further said that when Insp. Azhar showed him the contents of the bag, he was not asked about the owner of the bag nor about the person who brought the bag.

The next defence witness was Khairul Anuar (DW2). He corroborated the accused story about the visit by his friends Mohd. Noor and Kechik on 15 January 2001. They came by car and Mohd. Noor brought up one sport bag at the time of their arrival at 12.10pm but said that he had another bag which was still in the car, and than he wanted to temporarily place that bag with him. DW2 went back to work and called the accused to tell him of the visitors. DW2 never saw the bag and make no further mention of it, even after corning back at about 4.30pm and leaving the premises again later at 5pm to fetch his brother, Mohd. Foat in Pekan. He left Mohd. Noor at the premises, and asked Mohd. Noor to leave the key to the premises on the door frame. When DW2 came back with his brother at 9.30pm, nobody was at home. The rest of DW2's story about the arrival of police and the recovery of the bag at the premises next-door was the same with the accused's story. DW2 also stated that after their arrest (together with the 1st accused and his brother) the police did not ask about the ownership of the recovered bag.

During cross-examination, DW2 denied any knowledge of the 3 plastic packages found in his premises, and alleged that it was placed on the TV cabinet by one member of the police raiding party. DW2 admitted that before the police rushed into his premises, they did knock on the door.

Conclusion At The End Of Trial

At the end of the trial, learned counsel for the accused submitted that there was no possession by the accused of the cannabis that was discovered and that to prove trafficking there must be a sale transaction to another party. Learned counsel also submitted that mere knowledge is not possession and that there is no exclusive control of the premises by the accused person and further submitted along the lines in the case of *Ganapathy v. PP*

[1998] 2 CLJ 1, that there are many questions that remained unanswered, namely who brought the cannabis to the premises, and who was the last person that held the bag.

The learned deputy public prosecutor replied by submitting that there is direct evidence of trafficking and that there is sufficient evidence to denote knowledge and control.

After going through the notes of evidence, at the end of the trial and in particular after testing the defence story as against the case for the prosecution and in compliance with the provision of s. 173(m)(i) of the Criminal Procedure Code, I find that the prosecution has proved its case beyond reasonable doubt. I find that the defence story was just a bare denial.

The story of the two visitors, Mohd. Noor and Kechik who brought the bag (P9) is an after-thought and a concocted tale. This is so because the two names were only brought up during the defence; it was never put to any of the prosecution witnesses. (See the case of *Alcontara Ambross Antony v. PP* [1996] 1 CLJ 70, on the late disclosure of defence). The defence also tried to bolster such story by saying that the names were not mentioned earlier to the police because the accused was never asked any question that will surface the intended answer. It is a matter of common sense and a most reasonable reaction for the accused to explain (if true) about how the bag came into existence, without having to wait for questions. But alas, no such contemporaneous explanation ever did came out from the accused when confronted by the question "mana lagi ganja?"

I also find it difficult to swallow the story that the bag (P9) was discovered by the police without any assistance of the accused. Such allegation tantamount to a frame-up by the police. There is no evidence to indicate even a slightest reason why the police would want to frame the accused, particularly more in a capital punishment offence as in this case.

The learned counsel's submission on exclusive control of the premises and that mere knowledge is not possession will only hold water if there is no evidence of information leading to discovery under s. 27 of the Evidence Act and the consequential retrieval of the bagful of cannabis by the accused.

Furthermore the act of the accused in trying to run away at the presence and approach of the police at the place of arrest, does contribute to a certain degree to the cumulative effect of circumstantial evidence in ascertaining guilty knowledge on the part of the accused. At the very least it constitutes a reasonable inference from the situation that the accused had knowledge of the offending drugs, that was later discovered. There is a nexus between the conduct of the accused, his flight and the offence. Despite the Supreme Court decision in *Kiew Foo Mui & 2 Ors. v. PP* [1996] 1 CLJ 14 (which can be distinguished) where it was held that evidence of fleeing from the scene of crime as inadmissible evidence because it may amount to evidence of bad character, it would not be improper in this case to admit the evidence of any action of flight of the accused in the face of arrest as such action has a nexus with the offence. Such elaboration on the nexus between the flight of the accused and the offence can be seen in the cases of:

PP v. Chia Leong Foo [2000] 4 CLJ 649

PP v. Letchumanan [2000] 4 CLJ 685

PP v. Johar Mustafa [2004] 5 CLJ 187

PP v. Reza Mohd. Shah bin Ahmad Shah [2002] 4 MLJ 13

It is also worthy to note that the factual matrix of this case has on uncanny similarity with the unreported case of Kuantan High Court Criminal Trial no: 47-1 of 1990: *PP v. Karim b. Othman* 1993 MLJU LEXIS 646; [1993] 40 MLJU 1 where YA Lamin J (as he then was) applied the provisions of s. 27 Evidence Act, when the accused gave information (after a chase) leading to discovery. The question posed in that case was recorded as follows: "Ada lagi tak baki ganja yang awak simpan?" The accused replied, "Saya ada simpan baki ganja dalam seluar ditepi dinding dan bawah kayu ditepi pondok". The learned trial judge also dismissed the notion that by asking such a question, the police already had knowledge of the cannabis. The accused person was found guilty and sentenced to death.

The defence story also, failed on a balance of probabilities to rebut the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952.

As such, I therefore found the accused guilty in respect of both charges and convicted him. Accordingly I sentence the accused to two years imprisonment, with effect from date of arrest, in respect of the offence under s. 6 of the Dangerous Drugs Act 1952, and handed out the mandatory sentence of death, by hanging, in respect of the offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952.